Towards a Return to Constitutional Government: An Economic, Post-Romantic Argument for Ending the Bifurcation of Rights

Nikolai G. Wenzel & Allen Mendenhall[*]

Abstract

The United States government has steadily expanded beyond the enumerated powers set forth in the United States Constitution. Before 2020, the federal government controlled about 30% of the economy. This number rose to about 40% with COVID expenditures, which, given their timing, might be viewed as pre-electoral redistribution. The United States Supreme Court determines the constitutionality of government activity, but its jurisprudence in certain contexts relies on a presumption of constitutionality and a deference to the executive and legislature. At the root of the problem lies the Court's bifurcation of rights into fundamental political rights and non-fundamental economic rights. This article uses economic tools to show why the Court's bifurcation of rights rests on faulty assumptions of government benevolence and omniscience. It then argues for ending this bifurcation. Realistic and robust economic analysis, which we call "post-romantic," reveals that economic rights ought to enjoy the same respect as political rights under constitutional jurisprudence. An end to this bifurcation of rights would be a strong start toward restoring constitutionally limited government with its

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[*] Nikolai G. Wenzel is Professor of Economics at Universidad de las Hespérides and Associate Research Faculty at the American Institute for Economic Research. Allen Mendenhall is Associate Dean of the Sorrell College of Business at Troy University and Executive Director of the Manuel H. Johnson Center for Political Economy. For countless and pleasant hours of discussion, thanks to Mark A. Patton. For edits and research, thanks to Damon Miles. For inspiration, thanks to Clark Neily, Bob McNamara, and the Institute for Justice. For intellectual stimulation, thanks to Dominique Lazanski. Thanks also to participants at the 2019 conferences of the Association of Private Enterprise Education and the Southern Economic Association as well as the Radford University economics faculty. The usual disclaimer applies.

associated blessings of economic growth, poverty alleviation, and human flourishing.

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1. INTRODUCTION

Governments at all levels in the United States directly control and redistribute almost half the nation's economic production: In 2020, the federal government spent 31% of GDP, and combined state and local governments spent another 19%.[1] American businesses spend almost $2 trillion per year (or roughly another 10% of GDP)[2] complying with regulations,

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1 Christopher Chantrill, *Recent Total Spending in Percent GDP*, USGOVERNMENTSPENDING.COM, https://perma.cc/P4F6-RGS3.

2 CLYDE WAYNE CREWS JR., COMPET. ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 3 (2023), https://perma.cc/BN5S-ZELV.

including the 86,356 pages of the 2020 Federal Register.[3] The national debt stands at more than 125% of GDP.[4] In an era of lingering poverty, with about a fifth of Americans participating in some sort of welfare program[5] and the labor force participation rate at a historic low of 61%,[6] an estimated 30% of the American workforce is subject to occupational licensing (up from 5% in the 1950s).[7] Leviathan's tentacles touch every aspect of American life. The federal government has run rampant over individual liberties in the name of the War on Terror and the War on Drugs. Civil rights attorney Harvey Silvergate suggests that the average American may unwittingly commit multiple felonies a day.[8] Roughly one-third of the American prison population has been incarcerated for non-violent offenses that did not involve violation of property or person.[9]

In 1776, Thomas Jefferson elegantly and succinctly explained the purpose of government: "to secure these rights [Life, Liberty and the Pursuit of Happiness, among others], Governments are instituted among Men."[10] Add to that a list of grievances against the English Crown, and the Declaration of Independence amounts to around 1,300 words.[11] Compare that to the Code of Federal Regulations, which contains more than 180,000 pages.[12] Why this growth in regulation?

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3 NAT'L ARCHIVES & RECS. ADMIN., FEDERAL REGISTER PAGES PUBLISHED PER CATEGORY (1936–2023), at 2 (2023), https://perma.cc/FD5D-HPMF.

4 Christopher Chantrill, *US Federal Debt as Percent of GDP*, USGOVERNMENTSPENDING.COM, https://perma.cc/C8R2-8TT4.

5 *See* Candace Begody, *50 Important Welfare Statistics for 2023*, LEXINGTON L., https://perma.cc/36NG-TDK7; *Quick Facts*, U.S. CENSUS BUREAU (Apr. 1, 2020), https://perma.cc/GHK5-GC7K.

6 *Civilian Labor Force Participation Rate*, U.S. BUREAU OF LAB. STAT., https://perma.cc/Z64L-EF8S.

7 Lee McGrath, *A Primer on Occupational Licensing*, INST. FOR JUST. (Apr. 1, 2008), https://perma.cc/RQ9N-3CGB.

8 HARVEY SILVERGATE, THREE FELONIES A DAY, at xxxvi (2011).

9 *See* E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., NCJ 307149, PRISONERS IN 2022 — STATISTICAL TABLES 29–30, 33–34 (2023), https://perma.cc/UHU6-KM7J.

10 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11 Harvard Univ., *What is the Word Count of the Declaration of Independence?*, DECLARATION RES. PROJECT, https://perma.cc/7EU6-MRVE.

12 REGUL. STUD. CTR., TOTAL PAGES PUBLISHED IN THE CODE OF FEDERAL REGULATIONS (Feb. 28, 2024), https://perma.cc/E2KR-EDM2.

Part 2 of this article examines the theoretical constraints of the Constitution, emphasizing judicial abdication as a reason for the unconstitutional growth of the administrative state.[13] Part 3 moves into the particulars of judicial abdication, examining the bifurcation of rights into fundamental political rights and secondary economic rights.[14] Part 4 introduces economic theory—specifically, Public Choice theory and Austrian knowledge theory—to show why the Court's bifurcation of rights rests on faulty assumptions of government benevolence and omniscience.[15] Part 5 illustrates the theory from Part 4.[16] The final Part concludes.[17]

2. CONSTITUTIONAL CONSTRAINTS

The United States Constitution specifically enumerates for Congress no more than two dozen powers.[18] Article II of the Constitution enumerates the presidential powers to conduct foreign policy, grant pardons, sign treaties, and nominate high bureaucrats.[19] The massive federal bureaucracy today would have been unimaginable at the time of the American Founding.

Juxtapose the situation described above (31% of GDP controlled by the federal government, combined with runaway regulation) with the actual powers granted to the federal congress (arranged here by topic rather than in their original order): Congress may declare war; raise and support armies by appropriating funds; regulate and organize the armed forces; grant letters of marque and reprisal; call forth the militia to (a) execute the laws of the union and (b) suppress insurrections; organize, arm, and discipline the militia; lay and collect taxes and pay debts; borrow money to meet financial needs; regulate commerce; coin money and punish counterfeiting; issue legislation regarding patents; provide uniform rules regarding taxes, naturalization, bankruptcy, and standards of weights and measures; regulate post offices and post roads; create federal courts subordinate to the United States

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13 *See infra* Part 2.
14 *See infra* Part 3.
15 *See infra* Part 4.
16 *See infra* Part 5.
17 *See infra* Part 6.
18 U.S. CONST. art. 1, § 8.
19 U.S. CONST. art. 2.

Supreme Court ("the Court"); and define the scope and limitations on the jurisdiction of these federal courts.[20]

These provisions may have enabled a more powerful and centralized government than the one contemplated in the Articles of Confederation,[21] but they nevertheless constitute a limiting list. The interesting question, for our purposes, is not so much *why* the growth of the federal government occurred, but *how* it was allowed to happen within the constitutional framework.

The consensus view is that the Constitution was designed to limit the expansion of the federal government.[22] In the words of Madison's *Federalist* No. 51, the great challenge of constitutional design is this: "you must first enable the government to control the governed; and in the next place oblige it to control itself."[23] The Founders carefully and deliberately implemented their vision of a strictly limited government through two complementary mechanisms: first, a central government of delegated and enumerated powers, and second, a careful balancing of federalism and separation of powers at the federal level. As the saying goes, "ambition must be made to counteract ambition."[24] To continue with *Federalist* No. 51:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights.[25]

Two further mechanisms were added shortly after constitutional ratification: first, the Bill of Rights (1791), and second, judicial review to ensure the

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20 U.S. CONST. art. 1, § 8.

21 THE FEDERALIST NO. 51, at 348–53 (James Madison) (Jacob E. Cooke ed., 1961).

22 We accept the consensus view for the purposes of this article while acknowledging that other, contradictory views exist. *Cf.* Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2004 (2021).

23 THE FEDERALIST NO. 51, *supra* note 21, at 348–53 (James Madison).

24 *Id.*

25 *Id.*

constitutionality of legislation and executive action (1803).[26] The unfolding process of protecting rights was incomplete: It took another three-quarters of a century to end slavery,[27] a franchise limited by gender and race, segregation, and lingering state establishment clauses and monopolies. Still, two cheers for the Founding!

The Founders' concerns regarding an overreaching government were warranted. Their attempts to constrain the federal government failed by their own standards because the founding documents, including the Constitution, did not adequately protect against government expansion.[28] Not only has the federal government grown, but the Executive Branch effectively legislates through executive orders[29] and independent administrative agency rulings.[30]

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[26] *See* DOUGLASS ADAIR, *The Tenth Federalist Revisited*, *in* FAME AND THE FOUNDING FATHERS 75, 83 (Trevor Colbourn ed., 1974); *see also* DOUGLASS ADAIR, *"That Politics May be Reduced to a Science": David Hume, James Madison and the Tenth Federalist*, *in* FAME AND THE FOUNDING FATHERS, *supra*, at 93. For literature on constitutional political economy, see generally, for example, SCOTT GORDON, CONTROLLING THE STATE (Harvard Univ. Press 2002); 7 JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (1974); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

[27] U.S. CONST. amend. XIII, § 1.

[28] Although dated, Robert Higgs's *Crisis and Leviathan* is the classic study of the inexorable growth of the U.S. federal government. *See generally* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987) (detailing rapid growth of federal government).

[29] The basis for the presidential power to issue executive orders is Article II, Section 3, of the U.S. Constitution, which states that the president is obligated to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. According to Erica Newland, "executive orders . . . can derive their power from congressional delegations of authority to the President (explicit, implicit, or anticipated), from the President's independent authority under Article II of the Constitution, or from some vague combination of the two." Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030–31 (2015).

[30] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014) ("Nowadays . . . the executive acts against Americans through its own legislation and adjudication."). Hamburger adds that:

> the executive enjoys binding legislative and judicial power. First, its agencies make legislative rules dictating what Americans can grow, manufacture, transport, smoke, eat, and drink. Second, the agencies make binding adjudications—initially demanding information about

Rather than relying on statutory powers over states and localities, the federal government expanded its reach and authority by placing conditions on grant funding to states and localities.[31] The Constitution envisioned that Congress would regulate by creating binding statutes; however, the federal government regulates instead by placing conditions on the money it distributes.[32] These extortionary-like conditions may violate constitutional processes.[33] The federal budget reveals the extent to which the federal government has overregulated using conditional funding: In 1970, federal grants to states totaled $18 billion; as of 2021, that total is now $550 billion.[34]

> violations of the rules, and then reaching conclusions about guilt and imposing fines. Only then, third, does the executive exercise its own power—that of coercion—to enforce its legislation and adjudication.

Id. at 4. Accordingly, the rise of administrative agencies has collapsed important distinctions between the three branches of government and created a separation of powers problem, which implicates the non-delegation doctrine insofar as administrative agencies are executive creatures with lawmaking powers delegated by the legislature. Ilan Wurman has amassed evidence validating an originalist reading of the non-delegation doctrine that limits the powers of Congress to delegate legislative authority. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1503–07 (2021). According to Dean Reuter:

> [b]ecause all legislative power is vested, by the Constitution, in the legislature, agencies (part of the Executive Branch) have no legislative power whatsoever. Furthermore, Congress cannot delegate its legislative power to agencies—the constitutional infirmity arises when unelected and unaccountable agencies exercise the authority to legislate, to make law. Even if Congress delegates non-legislative power to agencies, legal problems arise when those agencies hold more power than has been properly granted. Holding true to the founders' fears, experience has shown that once agencies have power, they use it—agencies are very adept at identifying wrongs and wrongdoers and adopting all manner of rules and regulations to control conduct. When they legislate or exceed properly delegated powers, agencies overreach, exceeding the legal limits of their authority.

Dean Reuter, *Introduction*, *in* LIBERTY'S NEMESIS 1, 8 (Dean Reuter & John Yoo eds., 2016).

31 PHILIP HAMBURGER, PURCHASING SUBMISSION 132–33 (2021).

32 *Id.* at 5.

33 *Id.* at 5–6.

34 *Id.* at 6.

The New Deal ran roughshod over constitutionally enumerated powers, granting the federal government vast regulatory and redistributive powers.[35] Congress had by then disregarded the limits of its enumerated powers for a long time.[36] A long train of cases expanded government power far beyond that which the Constitution enumerated. Consider, for instance, *Prigg v. Pennsylvania*,[37] *United States v. Dewitt*,[38] *Knox v. Lee*,[39] *Champion v. Ames*,[40] and *A.L.A. Schechter Poultry Corp. v. United States*.[41] The Supreme Court effectively blunted the doctrine of delegated and enumerated powers by granting Congress the power to determine its own spending limits in *Helvering v. Davis*.[42]

The Courts have, in many respects, abdicated their role as final arbiters of constitutionality.[43] Recall the seminal words of Chief Justice John Marshall regarding the role of the judicial branch:

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35 Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 291 (2008); Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL'Y 925, 926–929 (2013); JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE 322–23, 341–344 (2000).

36 HAMBURGER, *supra* note 31, at 76–86.

37 41 U.S. 539, 567–68 (1842) (interpreting the Necessary and Proper Clause broadly).

38 76 U.S. 41, 43–44 (1869) (justifying congressional authority over internal trade with both the Necessary and Proper Clause and the Commerce Clause).

39 79 U.S. 457, 556 (1871) (construing the Necessary and Proper Clause liberally to grant broad and implied powers to Congress).

40 188 U.S. 321, 363–64 (1903) (interpreting the power to regulate Commerce to include the power to prohibit commerce).

41 295 U.S. 495, 510, 528–29, 546 (1935) (challenging congressional authority to enact the National Industrial Recovery Act but implying that Congress possessed regulatory powers over local activities with direct effects on interstate commerce).

42 301 U.S. 619, 622 (1937).

43 *Judicial abdication* is a widely used but seldomly defined phrase. Consider this explanation for the phrase:

> Judicial abdication occurs when judges refuse to apply the law that governs the case before them. Judicial abdication leaves the party legally entitled to a remedy without one. It leaves the party required to provide that remedy free from legal compulsion to do so. Actors legally in the wrong can act with impunity, or at least with impunity within the legal system.

Lawrence A. Alexander, *Judicial Activism: Clearing the Air and the Head*, *in* 44 JUDICIAL ACTIVISM: AN INTERDISCIPLINARY APPROACH TO THE AMERICAN AND EUROPEAN EXPERIENCES 15, 15 (2015); Josh Blackman, *Popular Constitutionalism After* Kelo, 23 GEO. MASON

> It is emphatically the province and duty of the [J]udicial [D]epartment to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the [C]ourts must decide on the operation of each.
>
> So, if a law be in opposition to the [C]onstitution; if both the law and the [C]onstitution apply to a particular case, so that the [C]ourt must either decide that case conformably to the law, disregarding the [C]onstitution; or conformably to the [C]onstitution, disregarding the law; the [C]ourt must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the [C]ourts are to regard the [C]onstitution; and the [C]onstitution is superior to any ordinary act of the [L]egislature; the [C]onstitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those then who controvert the principle that the [C]onstitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the [C]onstitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions.[44]

Alas, that is exactly what the courts have done: they have "close[d] their eyes on the Constitution" and "subvert[ed] the very foundation of all written constitutions."[45] We list, here, some egregious examples from the Court:[46]

L. REV. 255, 271 (2016) (noting the Supreme Court abdicated their role as "guardians of the constitutional rights of the people" to the States**).** Clark Neily presents *judicial engagement* as the "opposite" of *judicial abdication*. CLARK M. NEILY III, TERMS OF ENGAGEMENT 3 (2013).

44 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

45 *Id.* at 178.

46 *See* ROBERT LEVY & WILLIAM MELLOR, THE DIRTY DOZEN, at ix–xi (Cato Inst. 2009) (2008).

- *Home Building & Loan Ass'n v. Blaisdell*: States exercising their police power may restrain private contract rights to further the public interest despite the language of Article I, Section 10 of the Constitution.[47]
- *Helvering v. Davis*: The Social Security Act is constitutional because Congress may define its own limits under the general welfare clause despite the language of Article I, Section 8, and the Tenth Amendment.[48]
- *Wickard v. Filburn*: Congress may regulate *any* commerce (including *intra*state) that in the aggregate substantially affects interstate commerce—despite the language of the Commerce Clause in Article I, Section 8, providing for regulation of *inter*state commerce.[49]
- *Penn Central Transport v. New York City*: A state may impede a private party's improvement of its property, without compensation, under certain factual circumstances analyzed through multiple factors despite the Fifth Amendment's prohibition against government takings of private property for public use.[50]
- *Bennis v. Michigan*: Despite the language of the Takings Clause in the Fifth Amendment, a state civil asset forfeiture of a wife's car, which she owned jointly with her husband, is constitutional even if she was unaware that her husband used the car to have sex with a prostitute in violation of a gross indecency law.[51]
- *Kelo v. City of New London*: A city's exercise of eminent domain or taking of private property, including homes, to sell for private economic development was constitutional under an expansive interpretation of the phrase "public use," despite the language of the Takings Clause of the Fifth Amendment.[52]

In each of these cases, the Court failed or refused to exercise its legitimate review function, namely to check the overreach of another branch of government. The irony is that, in so doing, it widened its interpretive latitude to legitimize government activity, arrogating to itself the power to broaden the scope of constitutional provisions. The judiciary's abdication of its responsibility to uphold the Constitution is not just a philosophical abstraction. It has enabled the government to expand exponentially and given rise to special

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47 290 U.S. 398 (1934).
48 301 U.S. 619 (1937).
49 317 U.S. 111 (1942).
50 438 U.S. 104 (1978).
51 516 U.S. 442 (1996).
52 545 U.S. 469 (2005).

interests that benefit from legislation at the expense of wider society.[53] The floodgates have opened.

The Court alone cannot restore the judiciary as a coextensive branch of government because it hears only a limited number of cases: in a single year, 100–150 of the 7,000 cases brought before it.[54] With 3,000–4,500 regulations enacted per year,[55] the Court's yearly hearings would represent only a minuscule percentage of new regulations. And that is assuming the Court heard only cases exclusively focused on the constitutionality of *new* regulations.

This deficiency signals an inadequacy in the ability of the Court to strike down regulations. From 1954 to 2002, the Court struck down 0.67% of federal laws, 0.5% of federal administrative regulations, and 0.05% of state laws—and these infinitesimal figures are within the 5% or less of cases to which the Court grants certiorari.[56] This rate of constitutional invalidation results in excessive deference to administrative agencies, which, again, are creatures of legislation housed within the Executive Branch.

3. The Heart of the Matter: Bifurcated Rights and Judicial Deference

Thomas Jefferson rightly worried that "the natural progress of things is for liberty to yield, and government to gain ground."[57] The Court's bifurcation of fundamental and non-fundamental rights is partially responsible for this seemingly inexorable growth in government, relegating economic rights secondary to political rights.

In *Nebbia v. New York*, the Court upheld The Milk Control Law of 1933, which authorized the Milk Control Board to, among other things, fix

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53 Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 174 (2003).

54 *About the Supreme Court*, U.S. Cts., https://perma.cc/L7LZ-4958.

55 Maeve P. Carey, Cong. Rsch. Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register* 1 (2019), https://perma.cc/W33S-CD56.

56 *See* Neily, *supra* note 43, at 125.

57 Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), *in* 13 The Papers of Thomas Jefferson 208, 208–09 (Julian P. Boyd ed., 1956).

milk prices.[58] Leo Nebbia, the proprietor of a grocery store, was convicted for violating this statute when he sold quarts of milk at rates below the fixed price.[59] He defended himself under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[60]

The Court sided with the government, stating, "The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people."[61] The Court found that the general or collective good under these circumstances called for an exception to individual economic rights:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.[62]

The Court opined, furthermore, that the right of the public to regulatory protections was on par with private economic rights: "Equally fundamental with the private right is that of the public to regulate it in the common interest."[63]

Writing at the height of the Great Depression, the Court validated and extended, here, the police power of the several states to regulate industry and developed what would become known as the "rational basis" test.[64] The

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58 291 U.S. 502 (1934).

59 *Id.* at 515.

60 *Id.*

61 *Id.* at 517.

62 *Id.* at 523.

63 *Id.*

64 This early iteration of the test is encapsulated in these lines:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth Amendment, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the

Court's anticompetitive bias was evidenced by its denigration of "price-cutting and other forms of destructive competition."[65] Judge Janice Rogers Brown faults the *Nebbia* decision for "thwart[ing] the free market," harming consumers, and "protect[ing] the economic interests of a powerful faction."[66]

Four years later, the Court furnished the *Carolene* precedent with its now-famous, or infamous, Footnote Four.[67] The Court ruled that "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[68] Economic rights would henceforth be subject to a "rational basis test," while political rights would receive stronger protection.[69] Judge Brown submits that *Carolene* "relegated economic liberty to a lower echelon of constitutional protection than personal or political liberty, according restrictions on property rights only minimal review."[70] In other words, economic rights were no longer considered fundamental.[71]

Judge Brown blames *Vance v. Bradley* for demoting economic liberty from a fundamental to a non-fundamental right, stating that, in this case, "the Court abdicated its constitutional duty to protect economic rights completely, acknowledging that the only recourse for aggrieved property owners lies in the 'democratic process.'"[72]

Neily explains the distinction between the "strict scrutiny" applicable to fundamental (political) rights and the "rational basis test" applicable to

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> means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

Id. at 525.

65 *Id.* at 518.

66 Hettinga v. United States, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring).

67 United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

68 *Id.*

69 *Id.*

70 *Hettinga*, 677 F.3d at 480–81 (Brown, J., concurring).

71 *See id.*

72 *Id.* at 481.

non-fundamental (economic) rights.[73] When a law implicates political rights and the strict scrutiny standard of review, courts adjudicating its constitutionality require the state to show both a compelling government interest in curtailing individual rights for the public good and that the law was narrowly tailored to achieve its end.[74]

Economic rights, however, face a much looser "rational basis" test. Under this lower standard of scrutiny, government actions are "presumptively constitutional,"[75] and the burden of proof is on the party challenging the law to demonstrate that there is no rational basis for it.[76] But the test goes further: by affording substantial deference to the law, the test enables judges to *actively* help the government find a compelling justification underlying the law, including by invoking theoretical and hypothetical scenarios in which the law conceivably advances the public interest.[77] To this end, Justice Kennedy states:

> A statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.[78]

While the bifurcation of rights emerged during the New Deal Era, judicial deference to legislatures is much older. In 1827, the Court opined, "[i]t is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."[79] Although we have used the term "abdication," which implies inaction or passivity, the form of judicial abdication we have in mind empowers judges with

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73 NEILY, *supra* note 43, at 49.

74 *Id.*

75 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

76 *Id.*

77 NEILY, *supra* note 43, at 51, 54.

78 Heller v. Doe, 509 U.S. 312, 320–21 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); *see also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486 (1955) (opining on deference to state police powers).

79 Ogden v. Saunders, 25 U.S. 213, 270 (1827).

wide interpretive latitude to legitimize constitutionally questionable legislation. By contrast, originalism as a hermeneutic restrains judges, forcing them to ascertain to the extent possible the common meaning of words at the time of their issuance and holding judges to the text of the Constitution rather than to a judge's policy preferences.[80]

The Court's willingness to presume that alleged violations of "secondary" economic rights are constitutional until proven otherwise not only protects poor statutes from invalidation but also emboldens the legislature to push the boundaries of the rational basis test, encroaching further on economic rights.

4. AN ECONOMIC CHALLENGE TO JUDICIAL ABDICATION

Madison's vision was that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."[81] Instead, "our courts are not fully performing that duty. They are not acting as neutral arbiters in all cases. They often rationalize government action instead of judging it."[82] This abdication translates into the Supreme Court's deference to its sister branches of government. We now examine this jurisprudence through economic analysis.[83]

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80 *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW, at xxvii (2012); *see also* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233–34 (2006).

81 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

82 NEILY, *supra* note 43, at 2.

83 As a sidebar, one might pause here and ask *why* the court has abdicated its responsibilities. One theory, advanced by legal scholar Elizabeth Price Foley, is that the Court has in fact expanded its own power through its arbitrary jurisprudence: "The Court's selective incorporation approach using the Due Process Clause has thus given it control over the timing and content of the rights incorporated against the States." Elizabeth Price Foley, *Judicial Engagement, Written Constitutions, and the Value of Preservation: The Case of Individual Rights*, 19 GEO. MASON L. REV. 909, 917, 923 (2012). Another, more cynical, theory comes from economist Murray Rothbard. The Supreme Court, as a branch of federal government will always expand federal government power, in a classic example of logrolling and elite collusion:

4.1. Robust Political Economy

To be desirable, a proposed political theory or institution must stand up to the test of reality. To quote Gene Callahan, "fantasy is not an adult policy option," and beautiful theories that flounder at the first contact with reality are not particularly helpful.[84] We can thus use political economy to determine which jurisprudence is sufficiently robust to withstand the shortcomings of fallible human beings. In the simplest terms, a robust political economy recognizes that people are not omniscient and cannot be assumed to be benevolent.[85] Which institutions are sufficiently robust to cope with these two problems? Which will minimize harm and maximize the opportunities for human flourishing?

In any realistic analysis of public policy, we must consider both the "knowledge problem" (policymakers cannot simply be assumed to have sufficient knowledge to engineer social outcomes without unintended consequences) and the "incentive problem" (policymakers cannot blithely be assumed to hold to heart the best interests of their constituents, but must be

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> It is true that, in the United States, at least, we have a constitution that imposes strict limits on some powers of government. But, as we have discovered in the past century, no constitution can interpret or enforce itself; it must be interpreted by *men*. And if the ultimate power to interpret a constitution is given to the government's own Supreme Court, then the inevitable tendency is for the Court to continue to place its imprimatur on ever-broader powers for its own government. Furthermore, the highly touted "checks and balances" and "separation of powers" in the American government are flimsy indeed, since in the final analysis all of these divisions are part of the same government and are governed by the same set of rulers.

MURRAY N. ROTHBARD, FOR A NEW LIBERTY 58 (2d ed. 2006). But we focus here on the weakness of the jurisprudence rather than the Court's motivations.

84 Gene Callahan, *Fantasy Is Not an Adult Policy Option*, FOUND. FOR ECON. EDUC. (Feb. 24, 2010), https://perma.cc/Q9TH-LJKP.

85 For a detailed case, see MARK PENNINGTON, ROBUST POLITICAL ECONOMY 2–3 (2011). For a briefer outline, see Peter T. Leeson & Robert Subrick, *Robust Political Economy*, 19 REV. AUSTL. ECON. 107, 107–08 (2006).

assumed to advance their own interests where they can).[86] Leeson and Subrick summarize the problem:

> In the context of political economic systems, "robustness" refers to a political economic arrangement's ability to produce social welfare-enhancing outcomes in the face of deviations from ideal assumptions about individuals' motivations and information. Since standard assumptions about complete and perfect information, instantaneous market adjustment, perfect agent rationality, political actor benevolence, etc., rarely, if ever actually hold, a realistic picture and accurate assessment of the desirability of alternative political economic systems requires an analysis of alternative systems' robustness. The Mises-Hayek critique of socialism forms the foundation for investigations of robustness that relax ideal informational assumptions. The Buchanan-Tullock public choice approach complements this foundation in forming the basis for investigations of robustness that relax ideal motivational assumptions.[87]

In other words, a robust political economy is not concerned as much with empowering as it is with constraining: it calls for a constitutional

> system under which bad men can do [the] least harm. It is a social system which does not depend for its functioning on our

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86 For details on the knowledge problem, see, for example, F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–20 (1945); HAYEK, *supra* note 26, at 4; LEONARD READ, I, PENCIL 8 (1958). For details on the incentive problem (within Public Choice theory), see 3 JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 205–08 (Liberty Fund, Inc. 1999) (1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 57–58 (1971). For a prescient synthesis, see also FRÉDÉRIC BASTIAT, THE LAW 6–7 (Dean Russel trans., Found. for Econ. Educ., 2d ed. 1998) (1850), https://perma.cc/QHV9-5DPM. For a discussion of the "knowledge problem" and the common law, see Allen Mendenhall, *The Use of Knowledge and Moral Imagination in the Common Law*, 45 OHIO N.U. L. REV. 183, 184–85 (2019); Allen Mendenhall, *Libertarianism and the Common Law*, 11 BELMONT L. REV. 119, 120–21 (2023).

87 Leeson & Subrick, *supra* note 85, at 107; *see also* Sanford Ikeda, *How Compatible Are Public Choice and Austrian Political Economy?*, 16 REV. AUSTRIAN ECON. 63, 63 (2003) (detailing the "Ikeda synthesis" of the Austrian knowledge problem and Public Choice's incentive problem).

> finding good men for running it, or on all men becoming better than they now are, but which makes use of men in all their given variety and complexity, sometimes good and sometimes bad, sometimes intelligent and more often stupid.[88]

4.2. The Knowledge Problem: Institutions for Non-Omniscient Agents

Economic, political, and social analyses were fundamentally affected by two intellectual movements, ultimately transforming public policy in the twentieth century. First, positivism encouraged social scientists to treat the social sphere as they would the natural sphere, justifying attempts to engineer society as if it were mere clay in an omniscient potter's hands.[89] Second, the mid-century mathematization of economics led economists to eschew individual choice in favor of tidy mathematical models; differential equations and econometric regressions allowed the economist to counsel the prince about allegedly optimal social outcomes.[90] This methodology evolved into the dominant "neoclassical" school of economics, which holds that (a) markets do well in most small settings involving individuals and isolated business firms, but (b) market failure is prevalent and can be fixed by government intervention.[91] Moreover, (c) the macroeconomy is inherently volatile and needs management[92] of the kind championed by John Maynard Keynes (counter-cyclical fiscal policy and manipulation of interest rates).[93]

Against this new methodology emerged dissenting voices. As early as 1920, Austrian economist Ludwig von Mises explained that communism—as the *reductio ad absurdum* of central planning—could not, by its nature,

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88 F.A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 11–12 (1948).

89 *See* F.A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE 106 (1952).

90 Nikolai G. Wenzel, *What is Libertarianism?*, *in* NATHAN W. SCHLUETER & NIKOLAI G. WENZEL, SELFISH LIBERTARIANS AND SOCIALIST CONSERVATIVES? 45, 57 (2017).

91 *Id.*

92 *Id.*

93 *See generally* EDWARD J. LEIGHTON & WAYNE A. LÓPEZ, MADMEN, INTELLECTUALS AND ACADEMIC SCRIBBLERS (2012).

allocate scarce resources rationally.[94] Because communism rejects private property, it lacks prices and thus competition.[95] Without the profit and loss system to convert individual choices into efficient outcomes due to a division of labor and knowledge, there cannot be an efficient allocation of scarce resources; thus, communism must fail.[96] Although Mises was ultimately proven right, communism persisted for another 70 years, resulting in more than 100 million deaths.[97] Even if it was not completely discredited, central planning continues to hold a powerful grip on the modern imagination.[98]

More broadly, Mises's student F.A. Hayek also rebelled against what he perceived to be an "abuse of reason" or the (inappropriate) use of the methods of the natural sciences in the analysis of social phenomena.[99] Hayek and his fellow Austrian economists demonstrated why the neoclassical paradigm was fallacious from its assumptions to its methodology.[100] A complex and rich literature can be summarized as follows: in a world without omniscient agents, how can economic activity take place and how can social cooperation occur?[101] The quest for robust institutions to cope with the problem of non-omniscient people constitutes the second part of a robust political economy.[102] This research agenda is associated with the Austrian School of

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94 *See* Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth, in* COLLECTIVIST ECONOMIC PLANNING 87, 87–130 (F.A. Hayek ed., S. Adler trans., Routledge & Kegan Paul Ltd. 1935) (1920).

95 *See generally id.*

96 We thank Geoffrey Lea for his phrasing of this Misesian synthesis.

97 STÉPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM, at x (Harvard Univ. Press 1999) (1997); *see also* Alan Charles Kors, *Can There Be an "After Socialism?,"* ATLAS SOC'Y (Sept. 27, 2003), https://perma.cc/XXK6-649A; Nikolai Wenzel, *Socialism and the Modern Imagination: Reflections on Ayn Rand's* We The Living, ___ J. PRIVATE ENTER. (forthcoming ___ ___).

98 *See* Daniel Klein, *The People's Romance: Why People Love Government (as Much as They Do)*, 10 INDEP. REV. 5, 37 (2005).

99 HAYEK, *supra* note 89, at 92.

100 *Id.*

101 *Id.*

102 *Id.*

Economics.[103] While it started with economics, this counter-revolution has implications for knowledge and hence for jurisprudence.[104]

The so-called "knowledge problem" comes down to the simple fact of human ignorance. Indeed, there is much that individuals do not know. But there is also much that we do not know that we do not know. If we know that we are ignorant of something, we can acquire knowledge through books, conversations, teachers—or Google. But if we don't know that we don't know something, we cannot even begin the process of remedying our ignorance. Much of the knowledge that we have is tacit: we cannot even articulate it because we possess it implicitly, from gut feelings, rules of thumb, market signals, or tradition and custom. Likewise, most knowledge does not exist in any centralized repository but must be generated and discovered through the daily interactions of millions of individuals.[105]

To illustrate this somewhat abstract concept, we turn to *I, Pencil*, Leonard Read's clever autobiography of a pencil.[106] A pencil is more complex than it appears at first. It involves multiple inputs from numerous countries with different cultures, industries, and comparative advantages: miners for the ore, smelters for the metal, lumberjacks for the wood, bankers to facilitate the international transactions, a merchant marine, and navigational systems to bring all the elements together, and so forth.[107] In sum, "not a single person on the face of the earth knows how to make" a pencil.[108]

Yet pencils, for all their complexity, are cheap and abundant—without any single person in charge of manufacturing them. What makes this production possible? What brings together these "millions of tiny know-hows"?[109] In a world of radically limited knowledge, how are economic activities, the coordination and cooperation of market participants, or trade based on division of labor, even possible? The answer is that the price mechanism (which generates information about the relative scarcity of resources)

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103 RALPH RAICO, CLASSICAL LIBERALISM AND THE AUSTRIAN SCHOOL 3 (2012).

104 Gregory Scott Crespi, *Exploring the Complicationist Gambit: An Austrian Approach to the Economic Analysis of Law*, 73 NOTRE DAME L. REV. 315, 335 (1998).

105 *See* THOMAS SOWELL, KNOWLEDGE AND DECISIONS 13–14 (1980).

106 READ, *supra* note 86, at 5–6.

107 *Id.*

108 *Id.* at 6.

109 READ, *supra* note 86, at 7–8.

provides individual participants an incentive to cooperate and generally coordinates activity.

As a further illustration, suppose we are considering the construction of a bridge. Technical knowledge is required: the strength of steel or concrete, the appropriate structural design of the bridge, and so on. This is not the end of the story, however, because economic knowledge is also required: how much the different kinds or sizes of bridges will cost, how many people expect to cross the bridge and how often, how much people will pay (directly or indirectly) to cross the bridge, how much people value the alternate uses of the resources needed to construct and maintain the bridge, what financing mechanism is most appropriate (bonds to be repaid by users or taxpayers, user financing) to fund the building project, and so forth. Technical knowledge is readily available. The more difficult questions involve economic knowledge. How is this knowledge best acquired? How is it best transmitted? And what criteria should be used for resolving competing knowledge claims? These questions come down to processes of information aggregation and rules for making decisions under collective action; in sum, these questions come down to social choice.

Analytically, individual choice is easy. While each individual lacks complete knowledge about himself, he is still able to make decisions for his life, doing the best he can given the available information. But we still have a fundamental problem: how is information to be generated and used for collective decision-making?

Many economists claim a special knowledge about socially optimal results. This is the hallmark of the orthodox neoclassical theory against which the Austrian school rebelled. Social planners claim to know the optimal number of competitors in a market, the optimal minimum wage for workers, the optimal level of imports in an economy, or the optimal price of money—hence the public provision of welfare, education, monetary policy, agricultural subsidies, rent controls, minimum wages, and antitrust laws, among a whole slew of other interventions in the economy.

Nevertheless, the same policymakers, acting on the claimed knowledge of predictable outcomes of unpredictable factors, have caused or exacerbated major financial crises. Keynesian economists believed they

could control the Great Depression but extended and exacerbated it.[110] Eighty years later, policymakers claimed they understood the needs of the housing market before the Global Financial Crisis.[111] But instead of affordable housing for all, a crushing market crash resulted in a 31% increase in bankruptcy declarations throughout 2008,[112] and a disparate economic impact on lower-income and minority Americans.[113]

In a world of limited knowledge, imposition presents two problems. First, no individual has sufficient knowledge to determine ends for others.[114] It is thus little more than an arbitrary exercise of force to attempt to do so. Second, interventionism will lead to unintended consequences.[115]

Ludwig von Mises wrote of the dynamics of intervention, which, in one market, disrupts information flows and market equilibria, thus leading to a distortion in another market and another call for intervention, *ad infinitum*, in a domino effect.[116] In his example, if the government wishes to facilitate poor children's access to milk by placing a price ceiling on it, a disruption will occur. Dairy farmers have the same input costs but are suddenly faced with diminished revenue. Many will leave the market, sell their capital, and produce goods that do not suffer from price controls. This means the shelves are empty, and children don't get their milk. So, the government approaches the dairy farmers, who complain about the price of cattle feed. No problem! The government will now place a price ceiling on cattle feed. And the cycle continues perpetually. Examples of the unintended consequences of imposing limited knowledge on others include Prohibition, the failed and

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110 Robert Higgs, *Regime Uncertainty: Why the Great Depression Lasted So Long and Why Prosperity Resumed after the War*, 1 INDEP. REV. 561, 561 (1997).

111 Ronal Utt, *The Subprime Mortgage Market Collapse: A Primer on the Causes and Possible Solutions*, HERITAGE FOUND. (Apr. 22, 2008), https://perma.cc/L44Z-QXAF.

112 *See* U.S. CTS., *TABLE F-2—U.S. BANKRUPTCY COURTS BUSINESS AND NONBUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 2008* (2008), https://perma.cc/E3C4-LULN.

113 *See* Alexandra L. Mussler & Nikolai G. Wenzel, *The Financial Idea Trap: Bad Ideas, Bad Learning, and Bad Policies after the Great Financial Crisis*, 8 COSMOS + TAXIS 5, 11 (2020).

114 HAYEK, *supra* note 26, at 88 (confining himself to adults of sound mind for his general argument in the tradition of John Stuart Mill).

115 *Id.*

116 LUDWIG VON MISES, ECONOMIC POLICY: THOUGHTS FOR TODAY AND FOR TOMORROW 37–73 (Ludwig von Mises Inst., 3d ed. 2006) (1979).

costly drug war, the modern welfare state, the student debt crisis, soaring college costs, and the housing bubble and bust.[117]

Our limited knowledge calls for a prudent and principled rejection of social engineering because we lack the knowledge necessary to impose better outcomes.[118] Certain institutional characteristics ease the transmission of distributed knowledge that no one mind or group of minds retains.

The first is a limited scope of government to minimize coercive action and maximize free choice and voluntary association.[119] Hayek explains that "coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose."[120] There is thus no sense that we are "entitled to prevent [others] from pursuing ends which we disapprove so long as [they do] not infringe the equally protected sphere of others."[121] In a world without omniscient agents, a robust political economy does not allow for public imposition of private preferences.[122]

Second, a state must be constitutionally constrained, with clear rules set forth ex-ante for acceptably aggregating information, lest that state become an instrument to impose the will and knowledge of some on others coercively.[123]

Although they were not technically (or historically) Austrian economists, the American Founders, as a philosophical class, were aware of the knowledge problem.[124] They followed the principle of subsidiarity in leaving most powers to the states.[125] Consider, for instance, this verbiage from the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

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117 Peter J. Boettke & Steven Horwitz, *The House that Uncle Sam Built*, FOUND. FOR ECON. EDUC. (Jan. 5, 2016), https://perma.cc/JPD5-4VEW.

118 *See generally* 1 F.A. HAYEK, THE FATAL CONCEIT (W.W. Bartley ed., 1988) (describing this as "the fatal conceit," using the eponymous title of his last book).

119 HAYEK, *supra* note 26, at 133.

120 *Id.*

121 *Id.* at 79.

122 *Id.*

123 Aleksandar Novakovic, *Selfish Libertarians and Socialist Conservatives: The Foundations of the Libertarian-Conservative Debate*, 10 LIBERTARIAN PAPERS 1, 4 (2018).

124 *Id.*; *see also* Bernard H. Siegan, *Hayek and the United States Constitution*, 23 SW. U. L. REV. 469, 478–79 (1994).

125 George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 341, 403–04 (1994).

respectively, or to the people."[126] The Framers of the Constitution largely left economic activity to markets and civil society, with a limited sphere given over to the states and specific powers enumerated for the federal government.[127] Moreover, the Framers bound the federal government not just by tradition, federalism, and an armed people,[128] but by expressed constitutional constraints.[129]

This point brings us to the second aspect of a robust political economy: institutions sufficiently vigorous to cope with the incentive problem.

4.3. The Incentive Problem: Institutions for Non-Benevolent Agents

Before the revolution in so-called "Public Choice" economics—the public choice of collective action as opposed to the private choice of individuals acting in the market—political analysis was romantically divorced from reality, and public "servants" were assumed to be selfless executors of "the common good."[130] Likewise, market actors were also assumed to be benevolent, if narrowly self-interested.[131] As a result of these assumptions, markets were seen as yielding suboptimal results that could be corrected by selfless government agents.[132]

For Public Choice theory, people are people. The traditional dichotomy of people acting one way in market situations and another way through government is cast aside. Gone are individuals acting selfishly in markets and selflessly in government, acting for private gain in the market and for public interest in government. In government, just as in markets, people will consider several different variables that satisfy them: pleasure, profit, service to others, and leisure. But there is no longer a heroic assumption that

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126 U.S. CONST. amend. X.

127 *See, e.g.*, U.S. CONST. art. I, § 8.

128 *See, e.g.*, U.S. CONST. amends. II, X.

129 *See* U.S. CONST. art. I, § 9.

130 3 BUCHANAN & TULLOCK, *supra* note 86, at 19.

131 *Id.*

132 Thanks to Chris Coyne for help with phrasing here. For a thorough and accessible overview of intellectual history, see generally LEIGHTON & LÓPEZ, *supra* note 93, at 1–48. For a basic primer on public choice theory, see generally 3 BUCHANAN & TULLOCK, *supra* note 86.

individuals, upon election to political office or ascension to bureaucratic position, magically grow angel's wings. Instead, people respond to incentives and seek to further their own goals and aspirations. They aspire to maximize their satisfaction within constraints such as budgets, scarcity of time, laws and other rules, social norms and other informal institutions, ethical and religious considerations, and so forth. Even after the Public Choice revolution, people of all political stripes still cling to the assumption that virtuous leaders will overcome the people's shortcomings. Public Choice is skeptical of political superheroes: only through proper institutions can people appropriately orient their selfish interests to the service of others.[133]

This symmetry applies at the institutional level as well as the individual level. The "Nirvana Fallacy" comes from the work of economist Harold Demsetz, who encourages us to compare apples with apples and not oranges with Nirvana.[134] It is unfair and unsound to compare one institutional mechanism (the market) with an idealized perfection (Nirvana) while comparing its alternative (the state) with, well, nothing at all.[135] To use an eschatological analogy, we cannot compare a fallen world with heaven when heaven is not an option for a fallen world. The assumption that markets produce imperfect outcomes leads to calls for government regulation, but the overlooked question is whether the government can or will do a better job than the market. Consider public "corrections" of market failures ranging from Social Security to healthcare, public education, and nationalized money. Most of these cases see no improvement; in fact, they see a deterioration compared to market alternatives.

Beyond assumptions, Public Choice theory explains how the political process distorts incentives, leading to irrational and inefficient policies and yielding incoherent information about voter preferences.[136] Through the political process, policies tend to emerge that concentrate benefits and diffuse costs. These transfer wealth from the politically unorganized and invisible

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133 We thank Geoffrey Lea for his help with phrasing these problems.

134 Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1–3 (1969).

135 *Id.*

136 *See generally* JAMES D. GWARTNEY ET AL., ECONOMICS: PRIVATE AND PUBLIC CHOICE 109–29 (16th ed. 2018).

many to the politically organized and visible few while increasing the size and power of the redistributive state.

For example, each American adult pays an estimated $15 per year to subsidize an inefficient U.S. sugar industry that cannot compete in a free market but relies instead on trade protections and subsidies.[137] While it is in the interest of the sugar industry to preserve its estimated 3 billion dollars in annual subsidies,[138] it is not in the interest of any individual voter to fight for a $15 refund.[139] Nor is it in the interest of elected officials who generally face no incentive to favor individuals over organized lobbies that provide them with financial and political incentives. In fact, most Americans don't even know they are paying this subsidy. An estimated five out of six U.S. wealth transfers (not government purchases, but transfers of wealth through the political process) do not flow from wealthier Americans to poorer Americans.[140] Rather, they flow from the disorganized many to the organized few.[141]

In sum, the political process amounts to "rent-seeking," the use of government to take rather than create wealth. Such rent-seeking amounts to legalized plunder, as economist Frédéric Bastiat so eloquently explains in his essay, *The Law*.[142] In the words of journalist H.L. Mencken, "government is a broker in pillage, and every election is a sort of advance auction of stolen goods."[143]

Public Choice theory does not imply that government will never work. It does, however, provide a strong enjoiner to analyze government realistically and engage in honest comparative analysis of the market versus the state.

Where do the findings of Public Choice theory leave us? Which institutions are most likely to align the incentives of bureaucrats and politicians

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137 *See* Mark J. Perry, *Protectionist Sugar Policy Cost Americans $3 Billion in 2012*, AM. ENTER. INST. (Feb. 14, 2013), https://perma.cc/64BP-W9VY.

138 *Id.*

139 *Id.*

140 *See* GWARTNEY ET AL., *supra* note 136, at 111, 120–21.

141 *See id.* at 120, 122.

142 BASTIAT, *supra* note 86, at 7.

143 H.L. MENCKEN, *Sham Battle, in* ON POLITICS: A CARNIVAL OF BUNCOMBE 329, 331 (Malcolm Moos ed., The Johns Hopkins Univ. Press 2006) (1956).

with the interests of those whom they represent? Which institutions will tend to mitigate the redistributive tendencies of politics?

Post-romantic analysis of government pushes us to seek institutional designs that will be robust in the face of actors who cannot be assumed to work towards some "common good." Instead, the political problem requires the pursuit of institutions that will constrain bad behavior and incentivize good behavior. A post-romantic analysis calls for rule of law and constitutional constraints on the state. It also needs limited government to minimize the opportunities for government capture, wealth redistribution, and advancement of private preferences through public means. Voluntary mechanisms (the market and civil society) align incentives properly and, thus, vastly outperform the ballot box in aggregating and revealing preferences.

The American Founders were not technically (or historically) Public Choice theorists, of course. But they realized the problem of unchecked ambition. The language of *Federalist* No. 51, quoted above, reinforces this point.[144] Institutionally, the Framers of the Constitution checked the state through separation of powers, federalism, and democracy (itself tempered through representation to mitigate against excesses and abuses).[145]

4.4. An Economic Analysis of Judicial Abdication (1): Unconstrained Majoritarianism

Why are unfettered majoritarianism and the rational basis test problematic? How do they undermine the ideals of separation of powers, constitutionally limited government, and, more fundamentally, a free society?

When they defer to the political branches, courts may empower majorities in the political process at the expense of minorities.[146] The democratic ideal notwithstanding, majority rule alone cannot provide a sufficient safeguard to individual rights.[147] Democracy can excel at aggregating

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144 *See* THE FEDERALIST NO. 51, *supra* note 21, at 349, 351 (James Madison).

145 *See id.* at 350–51.

146 *See* Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J. dissenting) (discussing why the Court should not disturb the will of the majority).

147 *See* THE FEDERALIST NO. 51, *supra* note 21, at 351–52 (James Madison).

preferences but cannot be its own safeguard and thus requires rule of law and constitutional constraints.[148]

The Founders rightly feared tyranny of the majority as much as tyranny of the minority. Madison cautioned that "[a]n elective despotism, was not the government we fought for."[149] As proto-Public Choice theorists, the Founders left everyday decisions to majority rule but important decisions (like constitutional amendments or overriding a presidential veto) to a super-majority.[150] They removed individual rights from the political process by enshrining their protection in the Bill of Rights.[151] In the words of Justice Robert Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[152]

Undue or excessive judicial deference to the political branches violates the basic tenets of Public Choice theory as well as the Constitution's safeguards against government overreach. It goes against the lessons of Public Choice theory by presupposing that the legislature acts for some putative "common good." Such a romantic attitude is echoed in the writings of legal positivist scholar Hans Kelsen, who rejected the strong constitutional review envisioned by the Framers of the Constitution: "It was exclusively the public interest protected by the courts and not the private interest of the parties which

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148 *See* HAYEK, *supra* note 26, at 115–17; *see also* RUSSELL HARDIN, CONSTITUTIONALISM, LIBERALISM, AND DEMOCRACY 157–59 (1999). On majoritarianism versus judicial review, see Nikolai G. Wenzel, *Judicial Review and Constitutional Maintenance: John Marshall, Hans Kelsen and the Popular Will*, 46 PS 591, 594–97 (2013).

149 THE FEDERALIST NO. 48, *supra* note 21, at 335 (James Madison).

150 *See, e.g.*, U.S. CONST. art. II, § 1, cl. 3 (electoral college); *id.* art. V (constitutional amendments); *id.* art. I, § 7, cl. 2 (veto override).

151 *See id.* amends. I–X.

152 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

was decisive from the point of view of the procedure [of constitutional review]."[153]

This deference also goes against the Court's constitutional mandate—and the Founding philosophy—of constraining power and placing principle over expediency. Thomas Jefferson phrased this concern succinctly: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."[154]

4.5. An Economic Analysis of Judicial Abdication (2): "Compelling Government Interest"

The rational basis test has caused or enabled the Court to relegate economic rights to secondary status, creating conditions that undermine a robust political economy.[155] We thus examine how the weaker "compelling government interest" test is already problematic; *a fortiori*, our argument applies to the higher "rational basis" hurdle.

Public Choice theory, especially, teaches us to be leery of any claims of policymakers acting for the "public interest" or at least to not assume this outcome in the premises (as did pre-Public Choice political scientists and economists). The government is merely a market (though not quite competitive) of conflicting interests. In addition, Austrian economic theory warns about assumptions that government knows and does best. In a world of perfect knowledge and benevolent politicians and bureaucrats, a "compelling government interest" to fix everything that is broken would be reasonable, and the state might enjoy full operation of the economy. But we do not live in such a fantasy.

Even a sympathetic voice concludes that "[c]onstitutional law is here understood as judicial vindication of individual rights over and against

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153 Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 195–96 (1942).

154 Thomas Jefferson, Resolutions Relative to the Alien and Sedition Acts (Nov. 10, 1798), *in* 1 THE FOUNDERS' CONSTITUTION 292, 292 (Philip B. Kurland & Ralph Lerner eds., 1987).

155 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (emphasizing that legislatures, not the courts, should correct unnecessary economic regulations).

legislative pursuit of collective interests."[156] But what is really a "collective interest"? Likewise, a "'constitutional' question in the proper sense of jurisdiction" comes down to the "power authoritatively to settle a question concerning the common good."[157] Again, what is a truly *common* good? The only sensible answer is a narrowly defined combination of institutions—such as social order, shared ethical or social norms, rule of law, and markets—that are generally to everyone's advantage (that is, to a constitutional order dedicated to the preservation of individual rights).[158] The common good, properly so-called, is certainly not a hodge-podge of claims that emerge willy-nilly through the political process.

As an example of the *reductio ad absurdum* of "compelling government interest," consider the problem of religious liberty. It is one thing to see a conflict between free exercise of religion and the rights of others (as in, say, the complicated balancing of the religious rights of parents with the wellbeing of children). But it is another matter entirely to balance free exercise of religion with the result of a century of government intervention in the economy.

Take *Sherbert v. Verner*, in which the Court ruled that a South Carolina statute denying public welfare to recipients who refused to work on Sundays violated religious liberty under the Free Exercise Clause of the First Amendment.[159] The Court stated, "the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment."[160] Moreover, the Court alleged that the statute "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[161]

One might argue that living at the expense of taxpayers is a privilege rather than a right. But the Court cut this argument off at the pass: "Nor may

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156 Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 257 (1991).

157 *Id.* at 256.

158 JASON BRENNAN, THE ETHICS OF VOTING 192–93 (2011).

159 Sherbert v. Verner, 374 U.S. 398, 410 (1963).

160 *Id.* at 401.

161 *Id.* at 404.

. . . the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.'"[162] The Court opined, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[163] Thus, under this rationale, religious liberty is, ultimately, ancillary to government intervention.[164] One can imagine a future case finding a "compelling government interest" to override religious liberty.

If that possibility seems farfetched, what of the Affordable Care Act, the contraception provisions of which offended religious employers?[165] Cases involving such legislation implicate three fundamental questions: (1) Under what constitutional authority does the government force employers to provide benefits to its employees?[166] (2) Under what constitutional authority does the government abrogate contracts between employers and employees?[167] (3) What constitutional question ceases to be constitutional by the mere fact that an employer drops below 50 full-time employees?[168]

Employment Division, Department of Human Resources of Oregon v. Smith presents another example implicating the free exercise of religion.[169] Decided before the enactment of the Religious Freedom Restoration Act, *Smith* held that laws incidentally burdening religious practices were constitutional if they were couched in neutral language that is generally applicable to all.[170] The Court reasoned that religious liberty created no "extraordinary right to ignore generally applicable laws"; in other words, majoritarianism can trump individual rights.[171]

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162 *Id.*

163 *Id.*

164 *Id.*

165 *Cf.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) (holding there could be religious exemptions to the regulatory contraceptive requirement).

166 *Id.* at 2382 (discussing that the only question before the Court was the language of the statute and not other constitutional questions).

167 *Id.*

168 *Id.*

169 494 U.S. 872 (1990).

170 *Id.* at 878.

171 *Id.*

5. AN ILLUSTRATION: THE REGRESSIVE EFFECTS OF ECONOMIC REGULATION

The Austrian school assumes (or concedes, *arguendo*) good intentions on the part of policymakers and then demonstrates how their lack of knowledge will lead to unintended consequences and failure. The Public Choice approach assumes (or, again, concedes) complete knowledge and then questions the motivations of policymakers. Robust political economy questions both assumptions and knowledge.

The Progressive Era that bifurcated economic and political rights exemplifies the limits of majoritarianism and deference to legislatures. That era's leading jurisprudence was predicated on the assumption of sufficient knowledge to regulate economic issues effectively and to ascertain a public interest that trumped individual rights.[172] But Progressivism also facilitated segregation, sex-based labor laws to protect women and children as wards of the state, and, at its worst, coercive eugenics.[173] In 1927, the Court ruled in favor of compulsory sterilization of the "feeble-minded," arguing that "[t]hree generations of imbeciles are enough."[174]

In a society with lingering poverty, where many remain excluded from the bounty of capitalism, the poorest and most vulnerable need judicial protection of economic rights. Yet economic rights are often thwarted in the name of the public interest. The cost for Americans to comply with federal regulations is nearly $2 trillion,[175] a figure suggesting a diversion of resources away from productive investments, job creation, and productivity. Moreover, "U.S. households pay $14,514 annually on average in a hidden regulatory tax."[176]

Approximately one-quarter of Americans today require occupational licenses, up from 5% in the 1950s.[177] The Institute for Justice reports that "[o]n average, the requirements to secure these licenses remain steep: 362

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172 *See* DAVID BERNSTEIN, REHABILITATING LOCHNER 44 (2011).

173 *See id.* at 58, 78, 96.

174 Buck v. Bell, 274 U.S. 200, 207 (1927).

175 CREWS, *supra* note 2, at 1, 3.

176 *Id.* at 3.

177 Chris Edwards, *Occupational Licensing*, *in* EMPOWERING THE NEW AMERICAN WORKER 58, 59 (Scott Lincicome ed., 2022), https://perma.cc/LH7R-RL5J.

days lost to education and experience, at least one exam, and $295 in fees."[178] This kind of job licensing is typically regressive (as is regulation generally)[179] insofar as those with higher incomes can pay for the required courses, exams, and other licensing fees, whereas low-income earners, including those attempting to enter the job market, cannot. Cronyism—the use of public means to advance private interests through government favoritism of politically connected industries—has a direct and visible cost, especially on the poorest members of society.[180]

Redistribution and the rise of the regulatory state impede growth and hurt the poorest members of society who need growth the most. On a microeconomic level, the lack of respect for economic rights is regressive. On a constitutional level, it has opened the floodgates of runaway government, with general and regressive effects.

6. CONCLUSION

The argument in this paper fits into the greater project of judicial engagement, which calls for four basic principles to restore the Court's responsibility to uphold constitutionally limited government: (1) figuring out what the government is really up to; (2) making the government prove the authenticity of its goals; (3) not helping the government justify its actions; and (4) placing the burden of proof where it belongs, namely on the legislature or regulator thwarting constitutional rights or transgressing the limited, enumerated powers set forth in the Constitution.[181]

Scholars have made similar arguments for ditching the "arbitrary categorizations of individual rights" and applying strict scrutiny in *all* cases, not just when the legislature or regulators would take action that offends political rights.[182] Although we are enthusiastic about judicial engagement for the prospects of liberty and constitutionally limited government, we proffer

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178 LISA KNEPPER ET AL., LICENSE TO WORK 4 (3d ed. 2022), https://perma.cc/ZB42-SZRV.

179 Diana Thomas, *Regressive Effects of Regulation*, 180 PUB. CHOICE 1, 5 (2019).

180 Michael DeBow, *The Ethics of Rent-Seeking: A New Perspective on Corporate Social Responsibility*, 12 J.L. & COM. 1, 9–10 (1992).

181 NEILY, *supra* note 43, at 137–43; *see also Center for Judicial Engagement*, INST. FOR JUST., https://perma.cc/U3K3-LKEG.

182 Foley, *supra* note 83, at 927.

merely a narrow argument here. Our approach to economic rights, which parallels Foley's jurisprudential approach,[183] is, to use her language, admittedly a "semi-solution." But it is surely a good first step.

Political liberty cannot exist without economic liberty. And without economic liberty, freedom of expression is irrelevant: who owns the radios, the newspapers, the paper, the printing presses, the ink, or the trucks? Without economic liberty and the right to make an honest living, moreover, political rights are irrelevant. If the state owns or significantly thwarts economic rights and the opportunity to trade one's labor for a wage, political autonomy is non-existent.[184]

The Court has abdicated its role as a guardian, and the legislature and executive have ignored their constitutional purview. Much work remains to be done. As a start, the Court could ditch the *Carolene* bifurcation, treat economic rights with the same deference as political rights, and apply strict scrutiny to all government actions rather than deferring to majorities, legislators, regulators, and an imperial presidency. Doing so would be a crucial first step towards returning to a presumption of liberty and constitutionally limited government.[185]

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183 *Id.*

184 *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (40th anniversary ed. 2002); Ayn Rand, *Man's Rights*, *in* THE VIRTUE OF SELFISHNESS 108 (1964).

185 RANDY BARNETT, RESTORING THE LOST CONSTITUTION 255 (2014).